

March 19, 1998

## NASHVILLE, TENNESSEE

**IN RE:**

**PETITION OF AT&T COMMUNICATIONS OF THE SOUTH  
CENTRAL STATES, INC. FOR A DECLARATORY ORDER  
AS TO THE APPLICABILITY OF T.C.A. §§ 65-4-104, 65-4-114(1),  
65-4-117(3) AND 65-4-122(c), AND RULE 1220-4-2-.15 TO  
TELEPHONE DIRECTORIES PUBLISHED AND DISTRIBUTED  
ON BEHALF OF BELLSOUTH TELECOMMUNICATIONS, INC.  
CONTAINING THE NAMES AND TELEPHONE NUMBERS OF  
CUSTOMERS OF AT&T COMMUNICATIONS OF THE SOUTH  
CENTRAL STATES, INC.**

# DECLARATORY ORDER

This matter came before the Tennessee Regulatory Authority (the "Authority") upon the petition of AT&T Communications of the South Central States, Inc. ("AT&T") seeking a declaratory order as to the applicability of Tenn. Code Ann. §§ 65-4-104, 65-4-114(1), 65-4-117(3) and 65-4-122(c), and Authority Rule 1220-4-2-.15 to White pages directory listings published and distributed on behalf of BellSouth Telecommunications, Inc. ("BellSouth") by its affiliate BellSouth Advertising and Publishing Corporation ("BAPCO") containing the names and telephone numbers of customers of AT&T. On July 17, 1997, a hearing in this matter was held before the Directors of the Authority.

Preceding the conduct of the hearing on July 17th, both BellSouth and BAPCO were made parties herein by Order of the Authority dated February 20, 1997<sup>1</sup>. In addition, several telecommunications service providers sought intervention in this matter at times well in advance of the hearing, these providers are as follows: MCI Telecommunications, Inc., American Communications Services, Inc., and NEXTLINK Tennessee, L.L.C. ("NEXTLINK"). The foregoing providers were granted intervention by various Orders of the Authority, and were provided with the opportunity to fully participate as parties herein. The Directors of the Authority deliberated upon this matter for a decision on the record in this proceeding at a regularly scheduled Authority Conference on September 23, 1997.

Prior to that Conference, on August 1, 1997, Chairman Greer, filed his Charges of Law to the Directors.<sup>2</sup> Subsequently, on August 13, 1997, both BellSouth and BAPCO filed objections to the Charges of Law. At the September 23rd Conference, the Directors first considered the objections filed by BellSouth to the charges of law as filed by the Chairman. The Directors voted unanimously to sustain objection numbers four (4) and five (5), but denied the remaining three (3) objections. The Directors also considered the objections filed by BAPCO to the same charges. The Directors voted unanimously to incorporate the portions of charges of law prepared by BAPCO concerning the federal and state constitutional issues, as if stated verbatim, in the charges filed by the Chairman. In so doing, each of the Directors

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<sup>1</sup> This Order also appointed Director Melvin Malone to serve in the capacity as the Hearing Officer in order to dispose of pre-hearing matters. Additionally, the Order also required BellSouth and BAPCO to file responses to AT&T's petition within twenty (20) days from the entry of the Order. —

<sup>2</sup> The Charges of Law are used to fulfill the obligation of the presiding agency member acting in the role of Hearing Officer or Administrative Law Judge to advise the remaining agency members as to the law of the case as set forth under Tenn. Code Ann. §4-5-301(b).

independently acknowledged after discussion that they had considered the constitutional issues raised by BAPCO within this proceeding in their preparation for deliberating upon the merits of this matter.<sup>3</sup>

The Directors then considered NEXTLINK's Motion to Strike Portions of Mr. Barretto's Rebuttal Testimony.<sup>4</sup> The Directors voted unanimously to deny the motion.

Following the disposition of the pending motions, each Director openly deliberated in great detail on the merits of the case and stated his or her position as to the proper disposition of the issues. After the deliberations were concluded, the motion as stated by Chairman Greer prevailed. The motion and supporting comments are as follows:

As a regulator in Tennessee, I am bound by the parameters of federal law, state law and existing rules of this Agency. However, I am also charged with the duty of promoting telecommunications competition in this state according to the [state and federal] Telecommunications Act[s] of 1995 and 1996,<sup>5</sup> and with the duties of protecting the interest of both the consumers of Tennessee and the utility providers. Sometimes the fulfillment of all of these duties conflicts, not only with each other but with the applicable laws involved. I feel that the production of one complete phone book containing the names and numbers of all customers, promotes competition, reduces consumer confusion and best serves the needs of Tennessee. I feel this solution of one complete directory fulfills my policy goals and I would encourage this action to be taken by the parties involved.

All of that said, however, I must now determine what I am allowed to do under the law. The original petition brought four (4) statutes and one (1) Tennessee Public Service Commission/TRA rule in question. And I will explore each of these.

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<sup>3</sup> See Conference Transcript, pp. 54-57.

<sup>4</sup> See Conference Transcript, p. 57.

<sup>5</sup> The Tennessee General Assembly enacted the state Telecommunications Act with an effective date of June 6, 1995, while the federal legislation became effective on February 8, 1996.

First, [Tenn. Code Ann. §] 65-4-104 deals with the TRA's jurisdiction over public utilities. The TRA obviously has jurisdiction over BellSouth Telecommunications and the fulfillment of their obligations as a utility. **By virtue of contract, then, BAPCO, as BellSouth's agent, becomes responsible for the fulfillment of BellSouth's utility obligations under the law.** This is confirmed by Mr. Barretto's testimony on page 212 of the [hearing] transcript. (Emphasis supplied).

[Tenn. Code Ann. §] 65-4-114(1) empowers the Authority to require every public utility to provide safe, adequate and proper service, but it does not require that utility to provide such service to customers other than its own. This statute, then, in my opinion, is not really applicable to this case.

[Tenn. Code Ann. §] 65-4-117(3) enables the Authority, after hearing, by order in writing, to fix just and reasonable standards to be applied to any utility. This statute seems to be envisioning rules, which truly requires a rule-making proceeding. Thus, this statute is not applicable, in my opinion, to this case.<sup>6</sup>

[Tenn. Code Ann. §] 65-4-122(c) mandates that a public utility shall not make or give any undue preference to anyone. However, this statute applies more to the ratepayers than to the utilities, as evidenced in New River Lumber Company versus Tennessee Railway, 1921, thus, this statute is not relevant to this case either.

Now, Tennessee Public Service Commission Rule [TRA Rule] 1220-4-2-.15 mandates that a telephone directory be published regularly containing the names and numbers of all customers and distributed to all customers served by that directory. The directory must have the name of the utility, the area served, and the month and year of issue on the cover. I think this is a good place to mention that I am still confused as to whose name is on the cover of the current BellSouth directory. Mr. Barretto, in testimony on page 202 and 208-209 of the transcript, claims that the name on the cover is BAPCO and not BellSouth Telecommunications. If this is true, then BellSouth Telecommunications is in violation of Rule 1220-4-2-.15, as further described in Mr. Barretto's testimony on pages 144 and 145 of the transcript. I find Mr. Barretto's testimony disturbing in that it appears that BellSouth and BAPCO are using the BellSouth logo to suit their own purposes and not for the purpose specifically stipulated in the Rule.

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<sup>6</sup> In his deliberative comments, Director Malone noted that under Tenn. Code Ann. § 65-4-117(3), it was questionable as to whether the fixing of standards, regulations, practices or services imposed on a public utility which are generally applicable can be legally imposed when emanating from a contested case. (See Conference Transcript, p. 82).

I have been charged with the interpretation of this rule in resolving this issue. I feel that it is important to note that this rule was created in 1968, long before the 1996 Telecommunications Act and the push for competition. Keeping this in mind, and realizing that no more than one utility existed at the time of this statute to address, I believe that the plain language of the rule envisions the name and utility whose customers are inside the directory. Following the same logic, then, I believe that if more than one utility's customers are inside the same directory, then more than one utility's name would be on the cover. I do not believe I have the authority to allow a telephone book with no name on the cover.

The charges of law in this docket bring another important statute into focus, and that is [Tenn. Code Ann. §] 65-4-123. This statute discusses not only the policy of this state to permit competition in all telecom services markets, but also that this regulation shall protect the interest of the consumers. **This Agency has ruled that directory assistance is not a basic service for Tennessee consumers,<sup>7</sup> therefore, in my opinion, the white pages listing is a basic service and an essential tool the customer needs to efficiently and fairly use the network.** This telephone directory, then, needs to be complete and as easy to understand as possible. In my opinion, the names of local providers on the cover would be helpful to consumers. This would not only serve as information, but would also promote competition by showing consumers they have a choice in service providers. This method also allows small companies to continue to provide service without the financial burden of having to produce their own directory. They may contract with another carrier or publisher to satisfy their TRA Rule requirements and still have their name on the cover of the directory. (Emphasis supplied).

Therefore, after reading all of the testimony and briefs filed in this docket, and after a hearing on the merits, and after contemplation of both my duties as a regulator and my interpretation of the applicable rules and the statutes, I feel that the name or names of the utility or utilities, whose customers are inside the directory, by contract, should be allowed to be included in the cover in the same format. So, if a carrier contracts with another carrier or publisher to have their customers included in a combined directory, then the included carrier

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<sup>7</sup> This decision was made by a majority of the Directors in the matter of: *United Telephone-Southeast, Inc. Tariff No. 96-201 to Reflect Annual Price Cap Adjustment (Docket No. 96-01423)* and is discussed in the Authority's Order dated September 4, 1997. The majority in making the finding that directory assistance was not a basic service under Tenn. Code Ann. § 65-5-208(a) relied upon the legislative history surrounding the enactment of that statutory section. Director Kyle voted not to support the majority's finding concerning the directory assistance issue.

should have its name on the directory cover in a like format. **Thus, I move that AT&T be allowed to contract with BAPCO to have its name on the cover of the directory under the same terms and conditions as that of BellSouth's name. And further, BAPCO and/or BellSouth must offer the same terms and conditions to AT&T in a just and reasonable manner.** (Emphasis supplied). (See Conference Transcript, pp. 58-63).

Director Kyle seconded Chairman Greer's motion. (See Conference Transcript, pp. 73, 84 ).<sup>8</sup> Director Malone voted no, stating that while he agreed with the results, he thought this matter should have been concluded through a rulemaking procedure. (See Conference Transcript, pp. 85-86).<sup>9</sup>

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<sup>8</sup> Both Chairman Greer and Director Kyle agreed that Authority Rule 1220-4-2-.15 applied to this case. That Rule, entitled "Directories - Alphabetical Listing (White Pages)," provides in pertinent part as follows:

(1) Telephone directories shall be regularly published, listing the names, address, and telephone number of all customers, except public telephones and numbers unlisted at customer's request.

(2) Upon issuance, a copy of each directory shall be distributed to all customers served by that directory and a copy shall be furnished to the Commission [Authority] upon request.

(3) **The name of the telephone utility, the area included in the directory and the month of year of issue shall appear on the front cover.** Information pertaining to emergency calls such as for the police and fire departments shall appear conspicuously in the front part of the directory pages. (Emphasis supplied).

<sup>9</sup> In addition, Director Malone stated as follows:

As noted earlier, the Rule was promulgated in 1968. . . Therefore, given the time period of this promulgation and the passage of the 1995 Act, the Rule logically, it appears, only applies to the areas of the State in which a monopoly environment, as existed when the Rule was enacted, has remained intact.

See Conference Transcript, pp. 80-81.

On the basis of the foregoing statements and actions of the Directors, and on consideration of the entire record in this case, a majority of the Directors find and conclude that:

1. BellSouth is a public utility within the meaning of Tenn. Code Ann. § 65-4-101, providing telecommunications services, including local exchange telephone services, in Tennessee as a telecommunications service provider.

2. Pursuant to Tenn. Code Ann. § 65-4-104, the Authority has general supervisory and regulatory powers, and has jurisdiction and control over the public utilities that were parties to this proceeding, and over their property, property rights and facilities for the purpose of carrying out the provisions of Chapter 4 of Title 65.

3. In Chapter 408 of the Public Acts of 1995, now codified as Tenn. Code Ann. § 65-4-123, the Tennessee General Assembly adopted a new declaration of telecommunications services policy, and the Authority is to be governed by that policy in the exercise of its powers and duties with respect to telecommunications services and providers.

4. BellSouth has the duty to provide basic White pages directory listings in compliance with Tennessee law, including Authority Rule 1220-4-2-.15. BellSouth, by contract, has delegated the performance of that duty to its affiliate BAPCO with respect to basic White pages directory listings covering its local telephone service.

5. To the extent BAPCO acts for and on behalf of BellSouth in providing the publication of basic White pages directory listings in Tennessee, those directories must comply with the rules and directives of the Authority.

6. The name "BellSouth" and the Bell logo as they appear on the covers of basic White pages directory listings published by BAPCO on behalf of BellSouth in Tennessee are understood to refer to the local incumbent telephone company, BellSouth.

7. Finally, Section 271(c)(2)(B)(viii) of the Federal Telecommunications Act of 1996 provides that any Bell operating company, such as BellSouth, that seeks to enter the long distance market must list customers of competing local exchange carriers, such as AT&T, in its White pages directory listings.

Based on the findings of fact and conclusions of law and the entire record in this case, a majority of the Directors declare that BAPCO, in the publication of basic White pages directory listings on behalf of BellSouth, is required to comply with the directives of the Authority and the provisions of Authority Rule 1220-4-2-.15.<sup>10</sup> Further, in the publication of these directory listings on behalf of BellSouth which contain the listings of local telephone customers of AT&T and other competing local exchange providers, BAPCO must provide the opportunity to AT&T to contract with BAPCO for the appearance of AT&T's name and logo on the cover of such directories under the same terms and conditions as BAPCO provides to BellSouth by contract. Likewise, BAPCO must offer the same terms and conditions to AT&T in a just and reasonable manner.

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<sup>10</sup> Although BAPCO is not a public utility, by virtue of BAPCO's contract (of record in this case) with BellSouth regarding the publication of basic White pages directory listings, to the extent that BAPCO acts on behalf of BellSouth in providing such directories, BAPCO is bound by this declaratory order.



**IT IS THEREFORE ORDERED THAT:**

1. BAPCO, in the publication of White pages directory listings on behalf of BellSouth is required to comply with the directives of the Authority and the provisions of Authority Rule 1220-4-2-.15. Further, in the publication of these directory listings on behalf of BellSouth which contain the listings of local telephone customers of AT&T and other competing local exchange providers, BAPCO must provide the opportunity to AT&T to contract with BAPCO for the appearance of AT&T's name and logo on the cover of such directories under the same terms and conditions as BAPCO provides to BellSouth by contract. Likewise, BAPCO must offer the same terms and conditions to AT&T in a just and reasonable manner.

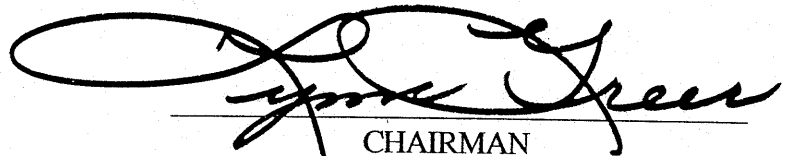
2. Objection numbers four (4) and five (5) to the Charges of Law as filed by BellSouth be sustained, and that the remaining three (3) objections be hereby denied.


3 BAPCO's objections to the Charges of Law concerning the federal and state constitutional issues be sustained, and the Charges of Law filed by the Chairman be and hereby the same amended to incorporate BAPCO's proposed language with respect to those issues as though stated verbatim therein.

4. NEXTLINK's Motion to Strike the Rebuttal Testimony of Mr. Barretto be denied.

5. Any party aggrieved by the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within ten (10) days from and after the date of this order; and

6. Any party aggrieved by the Authority's decision in this matter has the right of judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this order.

  
CHAIRMAN

  
DIRECTOR

ATTEST:

  
EXECUTIVE SECRETARY

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DIRECTOR

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**  
**Nashville, Tennessee**

**IN RE: PETITION OF AT&T COMMUNICATIONS OF THE SOUTH  
CENTRAL STATES, INC. FOR DECLARATORY ORDER AS TO  
THE APPLICABILITY OF T.C.A. §§ 65-4-114(1), 65-4-117(3) AND  
65-4-122(C) AND RULE 1220-4-2-.15 TO TELEPHONE  
DIRECTORIES PUBLISHED AND DISTRIBUTED ON BEHALF  
OF BELL SOUTH TELECOMMUNICATIONS, INC. CONTAINING  
THE NAMES AND TELEPHONE NUMBER OF CUSTOMERS OF  
AT&T COMMUNICATIONS OF THE SOUTH CENTRAL  
STATES, INC.**

**Docket No. 96-01692**

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**SEPARATE OPINION OF DIRECTOR MELVIN MALONE**

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Like the majority, I too am convinced that the Tennessee General Assembly's policy, as set forth in T.C.A. § 65-4-123, to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets requires, at this stage, that the front cover of the local white pages phone directory published by or on behalf of BellSouth Telecommunications, Inc. ("BellSouth"), which includes the names and numbers of AT&T Communications of the South Central States, Inc.'s ("AT&T") customers, should include the name and logo of AT&T in like manner to the name and logo of BellSouth. Thus, I agree with the ultimate result of the decision of the majority in this case. Nonetheless, I write separately because I would reach the same substantive result by a different path.

In this declaratory order action, AT&T has requested that the Authority issue a declaratory ruling on whether T.C.A. §§ 65-4-104, 65-4-114(1), 65-4-117(3), 65-4-122(c), or TRA Rule 1220-4-2-.15 require BellSouth to place AT&T's name and logo on the front cover of the local directory that is published by BellSouth Advertising and Publishing Company ("BAPCO") on behalf of BellSouth.

Consistent with the majority, in my opinion, this case turns upon the application of the Rule, as opposed to other state statutes relied upon by AT&T in this cause. The plain language of TRA Rule 1220-4-2-.15 mandates that "the name of the telephone utility" must appear on the front cover of the local phone directory.<sup>1</sup> The controlling question here is whether the Rule requires BellSouth to place AT&T's name and logo on the cover of BellSouth's local phone directory, or the local phone directory published on its behalf, when AT&T's customers are listed in said directory.

Unlike the majority, however, I have concluded that applying the plain language of the Rule, irrespective of its original intent and purpose, in the current environment would result in each local telecommunications services provider distributing or providing, directly or indirectly, its own phone book with its name on the front cover to its customers. No law was submitted nor phalanx of language offered in this case that resulted in a metamorphic effect on the plain meaning

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<sup>1</sup> TRA Rule 1220-4-2-.15, which has been in effect since 1968, provides in part that:

- (1) Telephone directories shall be regularly published, listing the name; address and telephone number of all customers[.]
- (2) Upon issuance, a copy of each directory shall be distributed to all customers served by that directory and a copy of each directory shall be furnished to the Commission upon request.
- (3) The name of the telephone utility, the area included in the directory and the month and year of issue shall appear on the front cover. (emphasis added).

or intent of the Rule into anything other than what it is. Nonetheless, I am persuaded that the imposition of such a daunting requirement as would be mandated by the plain language of the Rule and its original intent at this stage in Tennessee's transition to a competitive environment may result in crippling consequences to the development of competition.

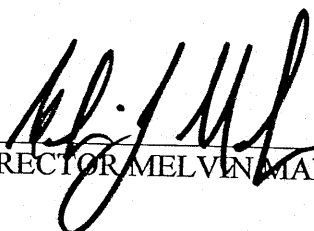
For the foregoing and other reasons, I have concluded that the most appropriate path in this case is to declare that neither the Rule nor §§ 65-4-114(1), 65-4-117(3), or 65-4-122(c) require BellSouth to place AT&T's name and logo on the front cover of the local directory published by BAPCO on behalf of BellSouth when AT&T's customers are listed therein.<sup>2</sup> Being ever mindful of the clear and unambiguous policy of the State of Tennessee to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets and this agency's general supervisory and regulatory power, jurisdiction, and control under § 65-4-104, I am persuaded that the most judicious manner in which to proceed is with a rulemaking to revise TRA Rule 1220-4-2-.15 and/or to develop a rule to apply in a competitive environment.<sup>3</sup>

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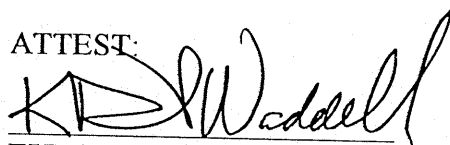
<sup>2</sup> With respect to the other statutes upon which AT&T requested a declaratory ruling in this case, namely §§ 65-4-114(1), 65-4-117(3) and 65-4-122(c), I am not convinced that they support AT&T's position. In considering the applicability of § 65-4-114(1), there simply is not enough support in the evidentiary record to conclude that a failure to grant the petitioner's request violates this statute. For instance, little was presented to persuade me that BellSouth's services would not be safe, adequate, or proper unless the petition was granted. With regard to § 65-4-117(3), nothing was presented to support a declaratory order action. This statute, in my opinion, is absent any language that would support the relief sought in a declaratory order. Additionally, it is doubtful as to whether the fixing of standards, regulations, practices, or services imposed on a public utility which are generally applicable can be legally imposed when emanating out of a contested case proceeding. Further, as concerning § 65-4-122(c), assuming that this statute is applicable, I have concluded that there is insufficient evidence in the record to support a determination that this statute requires the result sought by AT&T. In order to make a finding of unreasonable preference or advantage, the Authority must be presented with sufficient evidence to support the same. While many allegations, speculative statements and conclusory claims were put forth at the hearing, in my opinion, neither AT&T or the intervenors, separately or in combination, produced adequate evidence upon which this Authority could reasonably find an unreasonable preference or advantage under § 65-4-122(c).

<sup>3</sup> In my opinion, neither § 65-4-124(c) nor the Rule address pure yellow page directories. Moreover, I have concluded that none of the other state laws cited by AT&T mandate its request with respect to pure yellow page directories. Except that in circumstances where the yellow page directory is combined with the white page directory in a single volume, that single volume directory will be treated as a white page directory.

Hence, while I conclude that the path that I would choose to resolve this matter is more appropriate than that chosen by the majority, the result is the same - all competitors' names on the front cover of BellSouth's local phone directory.

  
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DIRECTOR MELVIN MALONE

ATTEST:

  
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EXECUTIVE SECRETARY